IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 09-534
	:	
v.	:	CIVIL ACTION
	:	NO. 12-3802
	:	
ERIC WALLLACE a/k/a	:	
MARSHALL GILMORE	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. February 24, 2014

Petitioner Eric Wallace ("Petitioner") is a federal prisoner incarcerated at United States Penitentiary-Hazleton in Bruceton Mills, West Virginia. Petitioner filed a pro se petition pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, claiming that he received constitutionally ineffective assistance of counsel at trial and on appeal, that he was denied due process at trial due to the government's knowing introduction of perjured testimony, and that he was incorrectly classified as a felon under 18 U.S.C. § 922(g) and as an armed career criminal under 18 U.S.C. § 924(e). See Pro-Se Mot. Vacate/Set Aside/Correct Sentence ("§ 2255 Pet."), ECF No. 49. For the reasons set forth below, the Court will deny the motion with prejudice, without an evidentiary hearing.

I. BACKGROUND

On December 11, 2009, Petitioner pled guilty to a one count indictment charging him with knowingly possessing in and affecting interstate commerce a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). See Guilty Plea Agreement ¶¶ 1, 6, ECF No. 32. The indictment arose from Petitioner's arrest, which occurred during a police investigation of a vehicle illegally parked at the intersection of Wyncote and 65th Streets in Philadelphia, Pennsylvania. See Prelim. Hr'g Tr., 5, Feb. 24, 2009 , ECF No. 56-2; Tr. Hr'g Mot. Suppress Physical Evidence, Nov. 13, 2009 ("Suppression Hr'g Tr.") at 6-7, ECF No. 56-1.[1]

On February 18, 2009, Officers Paul Gimbel and John Leinmiller observed the illegally parked van in an area known for drug trafficking activity. See United States v. Wallace, 450 Fed. Appx. 175, 176 (3d Cir. 2011). The officers approached the van on both the driver's and passenger's sides, and Officer Gimbel shined his flashlight into the van. Id. Officer Gimbel found four people in the van, one in the front passenger seat and three in the rear seat. Id. Petitioner was sitting in the middle position of

[1] The driver of the van involved in the instant matter was issued parking tickets for (1) illegally parking within 20 feet of the corner of the intersection of 65th and Wyncote Streets, and (2) for illegally blocking a pedestrian crosswalk. See Prelim. Hr'g Tr. at 5; Suppression Hr'g Tr. at 6-7, 13-14.

the rear seat. Id. As the officers approached the van, Officer Gimbel saw Petitioner reach below his waistband with both hands, as though going into or adjusting his waistband. Id. Fearing that Petitioner could be reaching for a weapon, Officer Gimbel instructed the occupants of the car to stop moving. Id., at 176; Suppress'n Hr'g Tr. at 8, 37.

Officer Gimbel testified that Petitioner did not comply with his command, at which point Officer Gimbel entered the van through the driver's side front door. See Wallace, 450 Fed. Appx. at 176-77; Suppression Hr'g Tr. at 8. After entering the van, Officer Gimbel testified that he instructed the occupants to put their hands up, and that Petitioner again did not comply. Suppression Hr'g Tr. at 9. Petitioner's non-compliance prompted Officer Gimbel to grab Petitioner's hands and raise them in the air away from Petitioner's waist area. Id. at 9-10. Officer Gimbel then conducted a pat down of Petitioner and recovered a loaded revolver with six rounds of ammunition. Id. at 10-11. Officer Gimbel also confiscated 34 additional rounds of ammunition for a .357 caliber hand gun. Id. at 11; Indictment 2, ECF No. 1.

Immediately following this incident, Petitioner was arrested and charged by the Philadelphia District

Attorney's Office with state offenses. See Government's Trial Mem. 1, ECF No. 21. On February 24, 2009, a preliminary hearing (hereinafter "Preliminary Hearing") was held at which Officer Gimbel provided an initial description of the events preceding Petitioner's arrest.

Following a conviction in a court of the Commonwealth of Pennsylvania for an offense stemming from the events of February 18, 2009, a federal grand jury returned a one-count indictment charging Petitioner with knowingly possessing in and affecting interstate commerce a firearm in violation of Title 18, U.S.C. §§ 922(g)(1) and (e). See Indictment 1.

After his arrest, Petitioner filed a motion to suppress physical evidence collected during the February 18, 2009 incident, arguing that the arresting officers lacked reasonable suspicion to believe that Petitioner was armed. Def.'s Mot. Suppress Physical Evidence ("Mot. Suppress") 1-2, ECF No. 15. Additionally, Petitioner contended that the officers had no legal basis to approach the van, as Petitioner asserted that a parking violation does not constitute a traffic violation for purposes of a Terry stop.[2] Mem. Supp. Mot. Suppress Physical Evidence

[2] Based on the observation that traffic stops represent particularly dangerous encounters for police officers, a line of

("Mem. Mot. Suppress") 2-4, ECF No. 15. At the November 13, 2009 suppression hearing on this issue (hereinafter "Suppression Hearing,") Officer Gimbel again testified to the events of the February 18, 2009 stop. See Suppression Hr'g Tr at 9.[3] Nevertheless, the Court denied Petitioner's

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jurisprudence has arisen to clarify when a police officer may conduct a reasonable search for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual." See Terry v. Ohio, 392 U.S. 1, 27 (1968).

[3] Alleged inconsistencies in Officer Gimbel's preliminary and suppression hearing testimony underlie both Petitioner's ineffective assistance of counsel and perjury grounds for § 2255 relief. Accordingly, in an attempt to clarify the extent of the alleged inconsistencies, the Court has reviewed relevant passages of the transcripts of both hearings.

At the preliminary hearing, Officer Gimbel testified on direct examination that "[a]s I got closer to the vehicle, [Petitioner] started to reach immediately towards his waistband area. Believing that he might be reaching for a weapon, I grabbed [Petitioner's] hand. I conducted a pat-down for weapons . . . ." Prelim. Hr'g Tr. 6:2-7. On cross examination, Petitioner's trial counsel further questioned Officer Gimbel about the stop, in the following exchange:

> A. I had not said anything to [Petitioner] or anyone until I saw him moving. At that time I told them to put their hands where I could see them.
> Q. And at that point [Petitioner] was compliant?
> A. Yes.

Prelim. Hr'g Tr. 8:25 – 9:4.

At the suppression hearing, Officer Gimbel again testified on the matter in question. On direct examination, the following exchange occurred:

> A. . . . I observed [Petitioner] reaching towards his waistband area. I don't know if [Petitioner] could hear me at that time. I told everyone in the car to stop moving . . . . I opened up the driver's side door of the minivan and went inside the minivan and told [Petitioner] to keep his hands still. And actually

motion, finding that Officer Gimbel had reasonable suspicion to conduct a pat-down for weapons. Order Den. Mot. Suppress 4, ECF No. 28.

The Court cited four factors which, taken together, formed a reasonable suspicion to justify the pat-down search:

> (1) the location where the [van] was parked is an area with frequent police activity; (2) it was approximately 7:30 in the evening and it was dark; (3) there were multiple unknown passengers in the [van], which was running, but the driver was not in the [van]; and (4) Defendant's hand movement and fumbling with his waist area in contravention of Officer Gimbel's command not to move.

> placed my hands and grabbed his hands off of his waistband area . . . .
> Q. And then I want to make sure we have the sequence of events right. So at that time you start to issue commands to the passengers in the vehicle?
> A. Correct.
> Q. Was [Petitioner] immediately compliant?
> A. Not immediately.

Suppression Hr'g Tr. 9:12 – 10:13. When cross examined on this matter by Petitioner's trial counsel, Officer Gimbel testified as follows:

> A. I told [Petitioner] and everyone else in the vehicle to stop, he did not immediately stop . . . .
> Q. Did you ask them to put their hands up in the air?
> A. Yes.
> Q. And you're saying that my client didn't put his hands up in the air?
> A. Not initially, no. Not until I entered the vehicle and grabbed his hands.

Suppression Hr'g Tr. 33:17 – 34:2.

Id. at 5. The Court also concluded, in line with jurisprudence arising from several other federal circuit courts, that an "attempt to distinguish between a parking violation and a traffic violation is a distinction without a difference, and therefore, the uncontested parking violation in this case constitutes a sufficient ground to initiate the Terry stop." Id. at 4.

On December 11, 2009, Petitioner pled guilty to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g) pursuant to a written plea agreement.[4] See Guilty Plea Agreement 4. Petitioner has two prior convictions for serious drug offenses as well as a prior conviction for a crime of violence, all arising from separate and distinct criminal episodes.[5] Accordingly,

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[4] This agreement preserved Petitioner's right to appeal both the Court's denial of his suppression motion and the applicability of the sentencing enhancement provision in 18 U.S.C. § 924(e)(1).

[5] On January 28, 1998, as a result of an arrest on September 7, 1994, Petitioner was convicted of the manufacture, delivery, or possession with intent to deliver a controlled substance in violation of 35 Pa. Cons. Stat. Ann. § 780-113(a)(30). See Government Sentencing Mem., Ex. A, Philadelphia Ct. C.P.R., Feb. 23, 1995, ECF No. 35. The controlled substance involved was cocaine, see id., and as such Petitioner's offense was classified a felony with a maximum available penalty of imprisonment not exceeding fifteen years, see 35 Pa. Cons. Stat. Ann. § 780-113(f)(l).

Also on January 28, 1998, Petitioner was convicted of a separate charge of manufacture, delivery, or possession with intent to deliver a controlled substance in violation of 35 Pa. Cons. Stat. Ann § 780-113(a)(30), which arose from a separate

at the sentencing hearing, the Court ruled that Petitioner was an armed career criminal for the purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e), and imposed the 180 month mandatory minimum sentence required by the statute. See Judgment as to Eric Wallace, Aug. 3, 2010, ECF No. 40.

Petitioner appealed, and on November 10, 2011, the United States Court of Appeals for the Third Circuit affirmed the judgment of the Court. See Wallace, 450 Fed. Appx. at 178.

II. LEGAL STANDARD

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arrest occurring on October 24, 1994. See Government Sentencing Mem., Ex. B, Philadelphia Ct. C.P.R., Jan. 13, 1998, ECF No. 35. Here as well, the controlled substance at issue was cocaine, making the offense a felony carrying a maximum available penalty of fifteen years imprisonment.

On November 16, 2001, Petitioner entered a guilty plea and was convicted of aggravated assault, a felony, in violation of 18 Pa. Cons. Stat. Ann. § 2702 in connection with an arrest on or about February 26, 2001 for repeatedly punching, kicking, and striking a victim with a wooden stick. See Government Sentencing Mem. 5; Id., Ex. C, Philadelphia Ct. C.P.R., July 30, 2001, ECF No. 35. Pursuant to 18 Pa. Cons. Stat. Ann. § 2702 (b), a conviction of aggravated assault may be considered a felony in either the first or second degree. First degree felonies in Pennsylvania carry a maximum sentence of twenty years, while second degree felonies carry a maximum sentence of ten years imprisonment. 18 Pa. Cons. Stat. Ann. § 1103(1), (2). The record does not make clear whether Petitioner pled to first or second degree aggravated assault. See Philadelphia Ct. C.P.R., July 30, 2001. However, even if Petitioner's guilty plea was to the lesser charge, this resulted in a criminal conviction for a state offense which included as an element the use of force and which was punishable by imprisonment for a term exceeding one year.

A federal prisoner "claiming the right to be released . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. The prisoner may challenge his sentence on any of the following grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States, (2) the court was without jurisdiction to impose such sentence, or (3) the sentence was in excess of the maximum authorized by law. Id. If it is clear from the record, viewed in a light most favorably to the petitioning prisoner, that he is not entitled to relief, then an evidentiary hearing on the merits of a prisoner's claims is not necessary. Id. § 2255(b). The court is to construe a prisoner's pro se pleading liberally, see Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam), but "vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation," United States v. Thomas, 221 F.3d 430, 437 (3d Cir. 2000).

III. DISCUSSION

Petitioner raises the following five grounds for § 2255 relief: (1) trial counsel was ineffective for failing to impeach Officer Gimbel's credibility at the suppression hearing and elicit a credibility ruling from the Court; (2) appellate counsel was ineffective for

failing to raise on appeal Officer Gimbel's inconsistency on the record; (3) the Government committed prosecutorial misconduct by proffering allegedly perjured testimony of Officer Gimbel at the November 13, 2009 suppression hearing; (4) appellate counsel was ineffective for not challenging the officers' legal basis to approach the van because a parking violation does not constitute a traffic stop; and (5) Petitioner "is innocent of being a felon" in possession of a firearm or ammunition in violation of 18 U.S.C. 922(g) due to a change in the law and thus he was improperly sentenced under 18 U.S.C. § 924(e).

The Court construes Petitioner's five grounds for § 2255 relief to present four issues: (1) ineffective assistance of counsel based on failure to raise alleged inconsistencies in Officer Gimbel's testimony; (2) ineffective assistance of appellate counsel for failure to raise an argument based on the legality of the police search; (3) violation of Petitioner's Due Process rights based on the Government's reliance on perjured testimony in the suppression hearing; and (4) improper application by the Court of 18 U.S.C. §§ 922(g) and 924(e). The Court addresses each set of arguments in turn.

A. Ineffectiveness of Trial and Appellate Counsel (Grounds 1, 2, and 4)

1. Ineffective Assistance Claims under Strickland

A violation of a criminal defendant's Sixth Amendment right to effective assistance of counsel can be the basis of a § 2255 petition. See Strickland v. Washington, 466 U.S. 668, 686, 697 (1984). Such a claim of ineffectiveness of counsel attacks "the fundamental fairness of the proceeding." Id. at 697. Therefore, as "fundamental fairness is the central concern of the writ of habeas corpus," "[t]he principles governing ineffectiveness should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." Id. Those principles require a convicted defendant to prove two elements: (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. Id. at 687; Holland v. Horn, 519 F.3d 107, 120 (3d Cir. 2008).

To prove deficient performance, a convicted defendant must show that his "counsel's representation fell below an objective standard of reasonableness." Ross v. Dist. Attorney of Allegheny, 672 F.3d 198, 210 (3d Cir. 2012) (quoting Harrington v. Richter, 131 S. Ct. 770, 787 (2011)). The court's "scrutiny of counsel's performance must be highly deferential." Douglas v. Cathel, 456 F.3d

403, 420 (3d Cir. 2006) (citing Strickland, 466 U.S. at 689). Accordingly, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Grant v. Lockett, 709 F.3d 224, 234 (3d Cir. 2013) (quoting Strickland, 466 U.S. at 689). When raising an ineffective assistance claim, the convicted defendant first must identify which acts or omissions by counsel are alleged to not result from "reasonable professional judgment." Strickland, 466 U.S. at 690. Next, the Court must determine whether or not those acts or omissions fall outside the "wide range of professionally competent assistance." Id.

To prove prejudice, a convicted defendant has the burden to prove that acts or omissions "actually had an adverse effect on the defense." Id. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

2. Petitioner's Ineffectiveness Claims based on Officer Gimbel's Testimony (Grounds 1 and 2)

Petitioner first argues that his trial counsel was ineffective because counsel did not attempt to impeach

Officer Gimbel's credibility at the suppression hearing with Officer Gimbel's allegedly inconsistent preliminary hearing testimony. This allegedly inconsistent testimony was Officer Gimbel's description of the sequence of events leading up to the pat-down search of Petitioner during the February 18, 2009 stop.[6] Petitioner cites as "exculpatory evidence" Officer Gimbel's cross examination testimony at the preliminary hearing, specifically, Officer Gimbel's statement that Petitioner promptly complied with Officer Gimbel's command to put up his hands. See Prelim. Hr'g Tr. 9:3-4.

As the excerpts presented infra at note 4 suggest, Officer Gimbel's statements at the suppression hearing contained some ambiguities and differed, in level of detail, from some of his statements at the preliminary hearing. In any event, the Court need not reach the question of whether an inconsistency in Officer Gimbel's statements occurred, because, even if it did, a finding of ineffectiveness of counsel would not follow.

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[6] Petitioner asserts that Officer Gimbel stated in his preliminary testimony that Petitioner had complied with his instruction to raise his hands, see Prelim. Hr'g Tr. 8-9, but that at the Suppression Hearing, Officer Gimbel asserted that he instructed Petitioner not to move and to raise his hands on two separate occasions, and that Petitioner ignored his instructions, see Suppression Hr'g Tr. 9. The Government asserts that Petitioner mischaracterizes Officer Gimbel's testimony, and that his statements, while containing varying degrees of detail, were consistent. See Government's Resp. Opp'n 7, ECF No. 56.

Petitioner's Sixth Amendment Right to effective counsel does not include the "right to compel . . . counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points." Jones v. Barnes, 463 U.S. 745, 751 (1983). Absent evidence to the contrary, the Court presumes that "the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 (internal quotations omitted). Accordingly, since it is "all too easy for a court examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," the Court must be "highly deferential . . . [and] indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland at 689.

In this case, trial counsel had a reasonable justification for failing to further cross examine Officer Gimbel at the suppression hearing as to the specific sequence of events during Officer Gimbel's confrontation with Petitioner, even though counsel was aware of the potential inconsistency. See Mem. Mot. Suppress 6, n.2 (noting the alleged inconsistency between Officer Gimbel's preliminary direct and cross examination testimony). At the suppression hearing, Officer Gimbel provided a detailed

description of the sequence in question during both direct and cross examination. See Suppression Hr'g Tr. 9, 34. Office Gimbel specifically stated that Petitioner did not "initially" place his hands in the air when commanded to do so. See id., 34:1. At that time, Counsel could have persisted in questioning Officer Gimbel about whether the Officer told Petitioner to place his hands in the air before grabbing his hands and when exactly Petitioner complied with this command. But, as the Government notes, this line of questioning would have had the effect of rehashing Officer Gimbel's damaging prior direct testimony, further emphasizing the events leading up to the arrest without developing any particularly significant impeachment evidence. Under these circumstances, Trial Counsel's decision to not raise Officer Gimbel's prior testimony at the suppression hearing, and Appellate Counsel's decision to not further pursue Officer Gimbel's testimony at the preliminary hearing, were strategic choices made by counsel "fall[ing] within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

Even if Counsels' failure to raise or pursue the alleged inconsistencies in Officer Gimbel's testimony was an "error[] so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment," Petitioner

still must satisfy the second prong of Strickland by proving "that the deficient performance prejudiced the defense." Id. at 687. This, Petitioner fails to do.

The Court is to measure the reasonableness of Officer Gimbel's pat-down search by weighing the totality of the circumstances. See Johnson v. Campbell, 332 F.3d 199, 211 (3d Cir. 2003); see also Terry, 392 U.S. at 21. Even in light of the alleged inconsistency of Officer Gimbel's testimony, the overwhelming facts (the furtive movements of Petitioner, the high crime area where the incident occurred, the presence of multiple passengers outnumbering the officers, and the fact that the incident occurred at nighttime, while it was already dark outside) weigh heavily in favor of finding a reasonable suspicion justifying Office Gimbel's subsequent actions.[7] Accordingly, Petitioner was not prejudiced by counsels'

[7] There is strong precedent for basing a finding of reasonableness on these cited factors. See, e.g., Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (finding that a stop occurred in a "high crime area" relevant); Maryland v. Wilson, 519 U.S. 408, 414 (1997) (finding that the presence of multiple passengers increases the likelihood of danger to an officer conducting a traffic stop); United States v. Moorefield, 111 F.3d 10, 14 (3d Cir. 1997) (suggesting that a defendant's "furtive movements" to weigh in favor of finding a pat-down search reasonable); United States v. Smith, 594 F.3d 530, 541 (6th Cir. 2010) (stating that factors such as that an incident occurred "late at night" or in a "high crime area" were relevant, though not solely determinative, to reasonableness).

failure to further pursue the alleged inconsistency in Officer Gimbel's testimony.

As Petitioner has failed to meet his burden under either prong of the Strickland test as to his claim of ineffectiveness of trial and appellate counsel for failing to raise and pursue arguments based on alleged inconsistencies in the testimony of Officer Gimbel, relief on these grounds will be denied.

3. Appellate Counsel's Failure to Challenge the Officers' Legal Basis to Approach the Van (Ground 4)

Petitioner also claims that appellate counsel was ineffective for not challenging the officers' legal basis to approach the van, arguing that the Third Circuit has not yet determined that a parking violation constitutes a traffic stop for the purposes of a Terry stop. The Government counters that appellate counsel was not ineffective because an argument based on the distinction between parking and traffic violations is a frivolous one.

As the Court stated in its Order Denying the Defendant's Motion to Suppress Physical Evidence:

> [t]here is no authority from the Third Circuit as to whether a parking infraction can justify a Terry stop, however, other courts of appeals have found that the rationale justifying an investigatory stop based on a moving violation applies with equal force to a parking violation. See United States v. Spinner, 475 F.3d 356, 358

> (D.C. 2007) (assuming without deciding that a parking violation justifies a Terry stop); United States v. Choudry, 461 F.3d 1097, 1103-04 (9th Cir. 2006) (parking violation falls within the scope of Whren); Flores v. City of Palacios, 381 F.3d 391, 402-03 (5th Cir. 2004) (parking violation could serve as reasonable suspicion to detain defendant); United States v. Copeland, 321 F.3d 582, 594 (6th Cir. 2003) (parking violation was analogous to traffic violation for purposes of probable cause).

Order Den. Mot. Suppress 3-4.

Once again, based on the consistent reasoning of four different circuits, the Court rejects the proposition that the law makes a legal distinction, for purposes of executing a Terry stop, between a parking violation and a traffic violation. As noted above, the Sixth Amendment right to effective counsel does not include a right for counsel to raise frivolous or meritless arguments. Based on the lack of legal support for Petitioner's argument about the illegality of initiating a Terry stop based on a parking violation, the Court finds that appellate counsel exercised reasonable judgment in declining to raise this argument. Therefore, the assistance of appellate counsel was not ineffective, and Petitioner's request for § 2255 relief on this ground will be denied.

B. Prosecution's Proffering of Purportedly Perjured Testimony (Ground 3)

Petitioner next argues that his Due Process rights were compromised by the introduction at the suppression hearing of alleged perjury. See § 2255 Pet. 9. Specifically, Petitioner asserts that a key government witness, Officer Gimbel, purposefully and falsely altered his testimony between the February 23, 2009 preliminary hearing and the November 13, 2009 suppression hearing to ensure that Petitioner entered a guilty plea. The Government did not expressly deny this claim in its Response, though the Court construes the Government's assertion that the testimony of Officer Gimbel is not inconsistent to be a denial of perjury.

The Supreme Court has held that federal due process forbids "a conviction obtained through use of false evidence, known as such by representatives of the state." See Napue v. Illinois, 360 U.S. 264, 269 (1959). Accordingly, "a convicted defendant may attack his sentence under § 2255 by alleging that a Government witness committed perjury." See United States v. Jones, 832 F. Supp. 2d 519, 534 (E.D. Pa. 2001) (Robreno, J.) (citation omitted); see also United States v. Agurs, 427 U.S. 97, 103 (1976) ("[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false

testimony could have affected the judgment of the jury."). To establish a due-process-based attack on a criminal sentence, a § 2255 petitioner must show not only that a testifying witness committed perjury, but also that the Government knew, or should have known, of the perjury, that the perjured testimony went uncorrected, and that there was a reasonable likelihood that the false testimony could have affected the outcome of trial. See United States v. Hoffecker, 540 F.3d 137, 183 (3d Cir. 2008) (citing Lambert v. Blackwell, 387 F.3d 210, 242 (3d Cir. 2004)).

Perjury occurs when a witness "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." See id.; see also United States v. Dunnigan, 507 U.S. 87, 94 (1993). By contrast, inconsistencies in witness testimony have not been found, on their own, to establish that the testimony is perjurious. See Lambert, 387 F.3d at 249 ("Discrepancy is not enough to prove perjury. There are many reasons testimony may be inconsistent; perjury is only one possible reason."); Rawlins v. United States, Crim. No. 04-154-05, 2013 WL 6182037 *5 (D.V.I., Nov. 21, 2013); Jones v. Kyler, Civ. No. 02-09510, 2005 WL 5121659 *8 (E.D. Pa., Aug. 3, 2005) (Robreno, J.) ("[M]ere inconsistencies in testimony

fall short of establishing perjury and most certainly do not establish that the government knowingly utilized perjured testimony.") (internal quotations omitted).

Even assuming that Officer Gimbel's testimony at the suppression hearing was in-part inconsistent with his testimony at the preliminary hearing, Petitioner does not point to any facts that suggest that Officer Gimbel testified at the suppression hearing with the willful intent to provide false testimony, or that the testimony was material to the Court's findings, much less that the Government knew or should have known that Officer Gimbel's testimony at the suppression hearing would vary significantly from his testimony at the preliminary hearing.

Therefore, relief on the basis that the Government relied upon perjurious testimony to obtain Petitioner's conviction, in violation of Petitioner's due process rights, shall be denied.

C. Petitioner's Conviction as a Felon in Possession (Ground 5)

Lastly, Petitioner challenges his sentence, stating both that he was improperly categorized as a "felon" for purposes of his conviction under 18 U.S.C. §922(g), and further, that he was improperly sentenced

under the Armed Career Criminal Act, 18 U.S.C. § 924(e), because his three prior convictions did not qualify for the enhancement in that statute. See § 2255 Pet. 12, 13. In support of these assertion, Petitioner mistakenly relies on the Fourth Circuit's opinion, United States v. Simmons, 649 F.3d 237 (4th Cir. 2011), which Petitioner contends stands for the proposition that "only people who could have actually faced more than a year in prison (custodial time) for their crimes qualify as felons under federal law." § 2255 Pet. 12 (emphasis in original). Petitioner's challenges to his conviction under § 922(g) and to his sentencing enhancement under § 924(e) both raise issues related to his prior criminal record. The Court, however, addresses each point separately.

1. Petitioner's conviction for possession of a firearm in violation of 18 U.S.C. § 922(g)

Under 18 U.S.C. § 922(g), it is unlawful for any person who has "been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce any firearm or ammunition." See 18 U.S.C. § 922(g). The Third Circuit has previously interpreted § 922(g) to refer to whether a prior crime carried a maximum permissible sentence of imprisonment for a term exceeding one year, not whether the

petitioner's actual time served for the prior crime exceeded one year. See United States v. Essig, 10 F.3d 968, 972 (3d Cir. 1998); see also United States v. Leuschen, 395 F.3d 155, 158 (3d Cir. 2005).

Because Petitioner's criminal record, described infra note 4, includes a conviction on at least one prior occasion of a crime as to which the maximum permissible sentences exceeded one year, he qualified as a "felon" for purposes of his conviction under 18 U.S.C. § 922(g), and Petitioner's challenge based on the inapplicability of § 922(g) fails.

2. Petitioner's Sentencing Enhancement under the Armed Career Criminal Act

Petitioner also challenges his conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e), arguing that his criminal record was too "minor" to qualify for this sentencing enhancement. See § 2255 Pet. 12. As stated above, a defendant convicted of violating 28 U.S.C. § 922(g)(1), who has at least three prior convictions involving violent felonies or serious drug offenses, is to be considered an armed career criminal and sentenced to no less fifteen years of incarceration. 18 U.S.C. § 924(e)(1) (2006).

A "serious drug offense" under § 294(e) includes state offenses "involving manufacturing, distributing, or possessing with the intent to manufacture of distribute" controlled substances "for which a maximum term of imprisonment of ten or more years is prescribed by law." See § 924 (e)(2)(A)(ii).

Section 924(e)g also defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year . . . that [] has as an element the use, attempted use, or threatened use of physical force against the person of another . . . ." 18 U.S.C. §924(e)(2)(B)(i).

Petitioner has three prior convictions resulting from separate incidents. See infra note 4. These three convictions satisfy the requirements provided for in the Armed Criminal Career Act, two as state felony convictions for controlled substance offenses carrying maximum sentences of greater than ten years, or "serious drug offenses," 18 U.S.C. § 924 (e)(2)(A)(ii), and one as a state felony conviction for the unlawful use of force carrying a maximum sentence of over a year, or a "violent offense," 18 U.S.C. §924(e)(2)(B)(i).

Finally, Petitioner's reliance on Simmons is misplaced. In Simmons, the Fourth Circuit reviewed a sentence under the Armed Career Criminal Act where the

district court found a petitioner's prior convictions to qualify as "serious drug offenses" based on hypothetical aggravating factors that a prior court could, but did not, apply in sentencing the defendant. By contrast, Petitioner's sentence under the Armed Career Criminal Act was based on three convictions which actually (as opposed to hypothetically, as in Simmons) qualified as "serious drug offenses" or "violent offenses." For the reasons set forth, Simmons therefore is distinguishable, and § 2255 relief based on the Court's alleged misapplication of U.S.C. §§ 922(g) and 924(e) will be denied.

IV. CONCLUSION

For the foregoing reasons, the Court will deny and dismiss with prejudice Petitioner's motion to vacate, set aside, or correct his sentence.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERIC WALLACE, a/k/a MARSHALL GILMORE	:	CRIMINAL ACTION NO. 09-534
Petitioner,	:	
	:	CIVIL ACTION
v.	:	NO. 12-3802
UNITED STATES OF AMERICA,	:	
Respondent.	:	

O R D E R

AND NOW, this **24th** day of **February, 2014**, for the reasons set forth in the accompanying memorandum, it is hereby **ORDERED** as follows:

(1) Petitioner's Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 51) is **DENIED with prejudice**;

(2) A certificate of appealability shall not issue;[8]

[8] A court issuing a final order denying a § 2255 motion must also decide whether to issue a certificate of appealability. The Court may issue the certificate "...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Pabon v. Mahanoy, 654 F.3d 385, 393 (3d Cir. 2011) (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)). Here, Petitioner has not made such a showing, as each of the grounds he raised can be resolved without need of an evidentiary hearing. Therefore, the Court declines to issue a certificate of appealability.

and

(3) The Clerk shall mark this case **CLOSED.**

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.